

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN JIM SHOCKLEY**, on January 29, 2003 at 8 A.M., in Room 137 Capitol.

ROLL CALL

Members Present:

Rep. Jim Shockley, Chairman (R)
Rep. Paul Clark, Vice Chairman (D)
Rep. Jeff Laszloffy, Vice Chairman (R)
Rep. George Everett (R)
Rep. Tom Facey (D)
Rep. Steven Gallus (D)
Rep. Gail Gutsche (D)
Rep. Christopher Harris (D)
Rep. Michael Lange (R)
Rep. Bruce Malcolm (R)
Rep. Brad Newman (D)
Rep. Mark Noennig (R)
Rep. John Parker (D)
Rep. Holly Raser (D)
Rep. Diane Rice (R)
Rep. Scott Sales (R)
Rep. Ron Stoker (R)
Rep. Bill Thomas (R)

Members Excused: None.

Members Absent: None.

Staff Present: John MacMaster, Legislative Branch
Lisa Swanson, Committee Secretary

Please Note. These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing & Date Posted: HB 389, 1/23/2003; HB 390,
1/23/2003; HB 418, 1/23/2003
Executive Action: HB 246; HB 389; HB 243

HEARING ON 418

Sponsor: REP. CAROL LAMBERT, HD 1, Wibaux, Fallon, Carter, and Powder River

Opening Statement by Sponsor:

REP. LAMBERT opened on HB 418 stating this bill revises the payment of costs at a detention center. She stated it would require the Department of Corrections (DOC) to pay the costs for holding a probation or parole violator in a county detention center if the DOC is the arresting agency. The bill would also mandate the DOC to pay all costs for holding a person from the date of conviction.

{Tape: 1; Side: A; Approx. Time Counter: 1 - 65}

Proponents' Testimony:

Harold Blatty, Assistant Director of Montana Association of Counties, supported HB 418 stating that the effective date of the bill needs to be amended to July 1, 2003. He stated that the bill should only apply to people who enter a guilty plea or who are found guilty, after the effective date.

{Tape: 1; Side: A; Approx. Time Counter: 66 - 89}

Daniel Watson, Rosebud County Commissioner, supported HB 418. He stated their judge is a "roving" judge whom they share with other counties. He said that Rosebud County also shares a detention center with other counties. He stated the biggest problem is the time between the verdict and the defendant's sentencing, which can go on for six months. He stressed that presentence investigations take a lot of time. During this time, the counties have been bearing the costs of incarcerating DOC prisoners awaiting transport. He emphasized that this bill would require the DOC to pay the housing costs from the date the person is convicted until transport to a prison.

{Tape: 1; Side: A; Approx. Time Counter: 90 - 113}

Linda Stahl, Missoula County, supported HB 418.

Opponents' Testimony:

Diana Koch, Chief Legal Counsel, DOC, opposed HB 418. She commented on the fiscal note stating the average daily rate in county jails for male and female inmates is \$53.99 per day. She took exception to a proponent's comment that PSI's take up to six

months. She stressed that in her experience, they only take 30 days on average. She stated that the counties should pay for their incarceration until they enter the prison. She commented that counties that have traveling judges is evidence why this is a bad bill. The DOC has no control over the county judges and how they conduct business. She urged a do not pass.

{Tape: 1; Side: A; Approx. Time Counter: 114 - 180}

Informational Testimony: None

Questions from Committee Members and Responses:

REP. NEWMAN asked Mr. Williams, Director of DOC, whether the DOC currently pays for incarceration of parolees. **Mr. Williams** stated the DOC pays for incarceration costs of parole, but not probation violators. He added that regardless of HB 418, the DOC will continue to pay for incarceration costs of parole violators.

{Tape: 1; Side: A; Approx. Time Counter: 181 - 200}

REP. HARRIS asked who pays the costs of incarceration for persons convicted of misdemeanors. **Mr. Williams** stated he does not know, but the DOJ might. He stated that if you are a probation violator, you have to be placed in the county jail and have a revocation hearing within 72 hours. He stated the county would pay the costs during that time. However, if they are revoked, then the DOC would begin paying the costs of incarceration.

{Tape: 1; Side: A; Approx. Time Counter: 201 - 230}

REP. HARRIS asked whether this bill covers individuals who have plead guilty or convicted of misdemeanors. **REP. LAMBERT** stated that the DOC should bear the cost of incarcerating anyone who is going to be shipped to the prison or who is under DOC supervision.

{Tape: 1; Side: A; Approx. Time Counter: 231 - 305}

REP. NEWMAN asked whether the DOC should pay costs of defendants who were convicted, spent a day or a month in jail, and then get a probationary sentence. **Mr. Blatty** stated that is the intent of the bill, to have the DOC cover any costs of incarcerating DOC commitments.

{Tape: 1; Side: A; Approx. Time Counter: 306 - 345}

Closing by Sponsor:

REP. LAMBERT closed on HB 418. She stated that the jails in Southeastern Montana are few and far between. She explained that it costs the counties great expense to pay the incarceration costs for DOC prisoners.

{Tape: 1; Side: A; Approx. Time Counter: 346 - 370}

HEARING ON HB 389

Sponsor: **REP. CAROL GIBSON, HD 20, Billings**

Opening Statement by Sponsor:

REP. GIBSON opened on HB 389. She explained that this bill would give the Department of Corrections (DOC) the power of designating where a defendant shall be incarcerated.

{Tape: 1; Side: A; Approx. Time Counter: 371 - 419}

Proponents' Testimony:

Diana Koch, Chief Legal Counsel, DOC, supported HB 389. She explained that the statutes have not kept up with the current state of affairs regarding the placement of inmates. She gave examples of the number of inmates who are suing the DOC for not being placed at the Montana State Prison. She stated that Montana has Deer Lodge Prison, three regional prisons, and the private prison. She stated that many prisoners have judgments which state they are to be incarcerated at the "Montana State Prison" which would be Deer Lodge. She explained that many prisoners have seized this discrepancy between the judgment and actual placement, to sue the DOC.

{Tape: 1; Side: A; Approx. Time Counter: 420 - 510}

{Tape: 1; Side: B; Approx. Time Counter: 1 - 18}

Opponents' Testimony: None

Informational Testimony: None

Questions from Committee Members and Responses:

REP. HARRIS asked Warden Mahoney about Shelby, as opposed to Deer Lodge, and why all the prisoners want to go to Deer Lodge.

Warden Mahoney responded that it's a point of litigation. He

conceded that Montana State Prison has more facilities and programs than Shelby.

{Tape: 1; Side: B; Approx. Time Counter: 19 - 29}

REP. CLARK asked whether the DOC has conferences with the judge on where to place a defendant. **Warden Mahoney** stated that a judge can either sentence a person to the DOC or sentence them straight to prison. He stated at present, if the judge sentences the person to Montana State Prison, then the DOC cannot place the person in another facility.

{Tape: 1; Side: B; Approx. Time Counter: 30 - 46}

Warden Mahoney stated although nobody is sentenced to an out-of-state prison, they do enter interstate compact agreements with other states. He explained that the DOC has about 30 inmates placed in out-of-state prisons. **REP. HARRIS** asked about the reasoning for sending an inmate out. **Warden Mahoney** cited the last prison riot as an example of sending inmates away who testified for the State for their protection.

{Tape: 1; Side: B; Approx. Time Counter: 47 - 70}

Closing by Sponsor:

REP. GIBSON closed on HB 389 urging a do pass.

HEARING ON HB 390

Sponsor: **REP. DAVE GALLIK, HD 52, Helena**

Opening Statement by Sponsor:

REP. GALLIK opened on HB 390 stating that this bill involves a "qui tam" or "False Claims Act" (Act). He stated that qui tam is an old law from feudal times and means, "he who sues on behalf of the King, also sues on his own behalf." He explained that this bill would allow a private person to bring an action against another person for making a false claim against a governmental entity. He explained that the person would recover less if the governmental entity intervenes. If the governmental entity does not intervene in the false claims suit, the person could collect between 25-50 percent as determined by the court. He stated that this bill would allow a private citizen to file the case, give notice to the governmental entity's attorney, and gives the governmental entity's attorney the opportunity to intervene or requests that the court dismiss. He stated another way to

proceed would be to file the false claim under seal with the Attorney General (AG). He explained that the AG may then prosecute the case on the State's behalf. If the AG does not prosecute, then the private citizen may file a complaint on his own behalf.

{Tape: 1; Side: B; Approx. Time Counter: 71 - 203}

Proponents' Testimony:

Al Smith, Montana Trial Lawyer's Association (MTLA), supported HB 390. He stated this concept is not new and the federal government has been doing it for a long time. He stated it came to the fore during the Civil War where profiteers were selling supplies to the Union Army. He stated there was a lot of price gouging, selling spoiled foods, and providing defective weapons. He stated private citizens were able to sue those profiteers and collect a share of the proceeds. He explained that qui tam is used a lot in Medicaid fraud actions. He stated that qui tam is also used in wrongful discharge cases. He explained this is a good bill to help out taxpayers and to prevent government waste and gouging. This bill would deter folks from stealing from the governmental entity which is ultimately stealing from the Montana taxpayers.

{Tape: 1; Side: B; Approx. Time Counter: 204 - 248}

Opponents' Testimony:

Informational Testimony:

Chris Tweeten, Chief Legal Counsel, Attorney General's Office, supported HB 390. He stated there are some technical concerns which some amendments may address. He explained whether a cause of action could be filed against a government employee. He stated there are people who would file baseless lawsuits against government agencies or their employees. He stated this bill would provide them with a powerful tool. He felt the bill needs some guidance for the court on attorney's fees. He stated the section on the whistle blowing employee needs to be amended as it is excessive in the awards for damages. He stated that making it too punitive against the government agency really punishes the taxpayers.

{Tape: 1; Side: B; Approx. Time Counter: 249 - 513}

Bud Clinch, Director, Department of Natural Resources and Conservation (DNRC), stated his concern of HB 390. He explained that on an annual basis, DNRC generates about \$12 million

a year from a handful of oil and gas leases. He stated that a consortium of attorneys approached DNRC two years ago to join a class action suit against a major oil company. Two years later, the suit came to an end, and the DNRC has finished their audit. The plaintiffs asked for damages of five billion dollars and settled for 110 million dollars. He stated that if Montana had been involved in the suit, its portion of the settlement would only have been thirteen cents per barrel in increases to the trust lands. He stressed that because DNRC chose to pursue the audit, instead of litigation, Montana's settlement equates to two dollars per barrel.

Questions from Committee Members and Responses:

REP. HARRIS stated that his understanding is the DOR's point contract provides a provision precluding State litigation with a contractor. He asked whether he would object to prohibiting those kinds of provisions so as to allow qui tam actions. **Mr. Tweeten** responded that he is not familiar with the points contract other than what he has read in the newspaper. He stated there would be some ramifications for a policy like that. **Mr. Tweeten** stated there are situations which would justify a qui tam action.

{Tape: 2; Side: A; Approx. Time Counter: 1 - 123}

REP. STOKER asked about the language on page 3, line 3-5, which states, "This section does not apply to claims, records, or statements made in relation to claims filed with the state compensation insurance fund under Title 39, chapter 71 or 72, or to claims, records, or statements made under the tax laws . . ."

REP. GALLIK responded that changes may be made to regard that section as applicable to governmental entities or their employees. **REP. CLARK** asked about exhausting internal procedures. **REP. GALLIK** responded that if you are working for the state and you discover someone is defrauding the government, it would make sense to go to your supervisor, and on up the chain of command, as opposed to running out and filing a lawsuit.

{Tape: 2; Side: A; Approx. Time Counter: 124 - 171}

REP. GALLUS stated he liked the concept but that the bill needs some work. He asked whether the sponsor of the bill could get together with Mr. Tweeten and Mr. Clinch to fix it so it does not get tabled. **REP. GALLIK** stated that he planned to do that.

{Tape: 2; Side: A; Approx. Time Counter: 172 - 231}

REP. NOENNIG asked how close this bill mirrors the federal statute on false claims. **REP. GALLIK** responded that if this bill seems too unwieldy, he would not be opposed to using the federal statute and just changing it to apply to Montana.

{Tape: 2; Side: A; Approx. Time Counter: 232 - 264}

CHAIRMAN SHOCKLEY asked how many other states have this statute and how often it is used. **REP. GALLIK** responded that 13 states have qui tam actions and that the number of cases, and the recoveries, have steadily increased over the years. He cited the following number of qui tam cases filed since 1987: 33 in 1987, 60 in 1988, 95 cases in 1989 and 483 qui tam cases filed in 1999. He stated the recoveries since 1987 to 1999 have also steadily increased with \$200,000 being recovered in 1987 and \$474 million collected in 1999. **CHAIRMAN SHOCKLEY** suggested sunset language in the bill. **REP. GALLIK** responded that would be fine if it would help get the bill passed.

{Tape: 2; Side: A; Approx. Time Counter: 265 - 302}

REP. HARRIS assumed there is no model code for qui tam actions. **REP. GALLIK** stated that is correct but that the federal qui tam statute is the statute most adopted. He stated that California's qui tam is modeled after the federal qui tam statute. He explained that in the federal and California qui tam statutes, you must file your complaint under seal, along with the supporting evidence, with either the U.S. Attorney or the Attorney General. He explained that the U.S. Attorney or the AG would look at it first so they may determine whether criminal charges should be filed. He stated that by the way the Hearing was unfolding, that Montana should handle qui tams that way as well.

{Tape: 2; Side: A; Approx. Time Counter: 303 - 324}

REP. EVERETT asked about the Lynx hair case and whether there are statutes to address a situation like that. **Mr. Tweeten** responded that there are current statutes which define official misconduct and that it can only be committed by a government employee. He stated it could also fit under theft for a number of different situations. He explained that there is a common law cause of action for conversion that exists that allows a person to recover property wrongfully taken. In addition, there are administrative statutes dealing with disciplinary measures for government employees.

{Tape: 2; Side: A; Approx. Time Counter: 325 - 361}

Closing by Sponsor:

REP. GALLIK closed stating that he will address the problems in the bill and bring it back with some amendments as suggested by **REP. GALLUS**. He stated the Legislature's biggest responsibility is as a steward of taxpayer dollars. He stated the qui tam would be a valuable tool to deal with the stolen equipment and the fleecing of governmental entities. He asked the Committee to give sufficient time before executive action, for amendments to be made to the bill, or give it to a subcommittee.

EXECUTIVE ACTION ON HB 243

Motion: **REP. HARRIS** moved that **HB 243 DO PASS**.

Motion/Vote: **REP. HARRIS** moved that **HB 243 BE AMENDED**. Motion carried unanimously by voice vote.

Motion: **REP. FACEY** moved that **HB 243 DO PASS AS AMENDED**.

Discussion:

The Committee discussed whether this bill would have unintended consequences. The Committee discussed whether the bill goes too far; that it would be so punitive as to have a negative effect. There was discussion about the amounts to be paid to the survivors and whether a dollar amount should be included in the bill. **REP. HARRIS** stated this bill is about sending a message; a very specific message to drunk drivers who kill someone. **REP. CLARK** asked about the disparity of both the survivors' and the offenders' economic status and how it would affect the outcome.

{Tape: 2; Side: B; Approx. Time Counter: 1 - 132}

REP. NOENNIG responded that he doubts there has been a dueling law suit filed lately. He stated that with regard to the term "maintenance" that it is used in the Uniform Marriage and Divorce Act for the measurement for what used to be called alimony. It states that you pay for the support of a spouse when you get a divorce. Maintenance of minor children would be interpreted to be child support. He explained that the problem is when you have a conflict in recoveries. He said that in a wrongful death action, the survivors are entitled to recover their loss. He stated in a survivorship action, the heirs are entitled to recover what the decedent would have been able to recover. He explained that equates to the decedent's earnings for the rest of their life expectancy. An economist would calculate, using an actuary table, the decedent's future earnings.

{Tape: 2; Side: B; Approx. Time Counter: 133 - 164}

REP. RICE spoke of the current situation whereby con artists load up a car with people, pull in front of a driver, brake, and collect a lot of money for "injuries." **REP. HARRIS** responded he has heard of this happening. However, he stated he does not find it a convincing argument without evidence the syndicate is moving into the area of drunk driving. **REP. RICE** responded that they are not talking about being drunk; that they are talking about one drink. She emphasized there is no finite payout amount, and no limits in the bill.

{Tape: 2; Side: B; Approx. Time Counter: 165 - 203}

REP. NOENNIG stated that there is a difference between the title and the purpose of a bill. The contents of the bill must fall within the title, but the title may be changed to reflect the contents of the bill. He stated that the bill cannot be changed to change the bill's purpose. He stated his concern that this is just a "message sending bill" as the methods for recovery already exist. He stated this bill would clutter the Code. **REP. HARRIS** responded that there would be no confusion from this bill as there is not double recovery for damages. **CHAIRMAN SHOCKLEY** stated that messages should be sent by Western Union. **REP. NOENNIG** stated he also has a problem with this being a strict liability offense. **REP. HARRIS** responded that this is not a strict liability case when you knowingly engage in the drinking and driving. He stated that as far as a message, it is a message.

{Tape: 2; Side: B; Approx. Time Counter: 204 - 276}

Vote: Motion HB 243 DO PASS AS AMENDED failed 5-12 by roll call vote with REPS. FACEY, GALLUS, HARRIS, PARKER, and RASER voting aye.

Motion/Vote: **REP. NOENNIG** moved that HB 243 BE TABLED and the vote reversed. No objection.

{Tape: 2; Side: B; Approx. Time Counter: 286 - 319}

EXECUTIVE ACTION ON HB 389

Motion: **REP. GUTSCHE** moved that HB 389 DO PASS.

Discussion:

The Committee discussed whether this bill was necessary. **John MacMaster** stated that he wrote the bill with the DOC. He explained that the law, at present, allows judges to sentence defendants to a detention center or to the State Prison. He explained that if the judge specifically states where the defendant should go, then they go there. The DOC wants it clear that it can decide where the inmate will actually be serving time. He stated that although the law states the judge will sentence the defendant to a state prison, the problem becomes, "Which prison?" He emphasized that this bill would give the DOC, and not the judge, the authority to decide which prison.

{Tape: 2; Side: B; Approx. Time Counter: 320 - 495}

CHAIRMAN SHOCKLEY stated that in his experience as a former federal prosecutor, the judge sentenced a defendant, then turned the person over to the Federal Department of Prisons. He felt the DOC should be able to choose where the defendants serve time.

Vote: Motion that HB 389 DO PASS carried unanimously by voice vote.

EXECUTIVE ACTION ON HB 246

Motion: REP. HARRIS moved that HB 246 DO PASS.

Motion: REP. HARRIS moved that HB 246 BE AMENDED.

Discussion:

REP. HARRIS explained that this bill merely codifies the Miranda warning into the Montana Code. He stated this bill does not change the law, only clarifies and codifies it. He stated that a stop and frisk, under Terry, is not considered custody, and would not trigger Miranda. **REP. FACEY** asked whether this bill could cause people to be Mirandized before necessary. **REP. HARRIS** responded that could happen without this bill. He cited a case in which the court stated that, regarding custody, they examine whether a reasonable person would not feel free to leave after considering such factors as the time and place, the length and mood of the interrogation, and people present at the interrogation.

{Tape: 3; Side: A; Approx. Time Counter: 1 - 101}

CHAIRMAN SHOCKLEY disagreed with REP. HARRIS. He emphasized that this bill would change the code. He stated he has a lot of experience in this area. He stated that in Arizona v. Miranda, the Court tried to do away with police abuse of people's rights. He stated it only involved interrogation. Miranda stated that custody and interrogation triggers a Miranda warning. He expressed that the problem with this bill is that it requires a person, who is arrested, to talk. **REP. HARRIS** stated the amendment takes care of that concern and would require a peace officer, before interrogation of a person in custody, to Mirandize the person.

{Tape: 3; Side: A; Approx. Time Counter: 102 - 128}

Vote: Motion that HB 246 BE AMENDED carried unanimously by roll call vote.

Motion: REP. HARRIS moved that HB 246 DO PASS AS AMENDED.

Discussion:

{Tape: 3; Side: A; Approx. Time Counter: 129 - 160}

The Committee discussed police getting evidence without the Miranda. Also the Committee discussed the Fourth and Fifth Amendments. **REP. NEWMAN** commented that there are pending federal cases on the Fifth Amendment; that Miranda is under attack right now. There is federal legislation aimed at restricting Miranda and cases pending which would restrict or temper Miranda. He explained that once the officer takes a person into custody, any questioning triggers Miranda; however, just custody does not trigger Miranda. **CHAIRMAN SHOCKLEY** stated the issue is usually custody.

Vote: Motion that HB 246 DO PASS AS AMENDED carried 11-7 by roll call vote with REPS. CLARK, GALLUS, MALCOLM, NEWMAN, NOENNIG, PARKER, and STOKER voting no.

ADJOURNMENT

Adjournment: 12 P.M.

REP. JIM SHOCKLEY, Chairman

LISA SWANSON, Secretary

JS/LS

EXHIBIT (juh19aad)